Davis Coal Company *and* Jesse Muncy *and* Bill Hall *and* James F. Mollett. Cases 9-CA-16228, 9-CA-16301, and 9-CA-16375

13 July 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 4 November 1982 Administrative Law Judge Burton S. Kolko issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified herein.

Respondent has excepted, *inter alia*, to the Administrative Law Judge's finding that it unlawfully discharged employee Dennis Swisher "because he was going to try to take the miners out on strike to protest his job assignment." In this regard, Respondent argues, *inter alia*, that the Administrative Law Judge erred in failing to find that it would have discharged Swisher for leaving his job prior to the end of his scheduled shift and refusing to do assigned work even absent his efforts to "take the miners out on strike." For the reasons set forth below, we find merit in this exception.

As the Administrative Law Judge found, Swisher was discharged on 27 October 1980[2] following a conversation with Richard Brown, Respondent's mine foreman, about his being removed from "his job" as motorman on the third shift and being assigned to the job of shoveling the belt line.[3] According to the credited testimony, during this conversation Swisher stated that, if he were not reassigned to "his job" as motorman, he would "ask the men to strike to help me get my job back"; in response, Brown stated, "[W]ell, if you ask them to strike, then I am going to fire you." Thereafter, Swisher went to get committeemen Bill Muncy and Bobby Marcum.[4] When Swisher, Muncy, and Marcum entered the mine office, Brown was talking to Don Davis, Respondent's general manager; upon their arrival, Davis told Swisher that he was "fired for walking off the job."

Based upon the foregoing, the Administrative Law Judge concluded that Respondent's asserted reason for discharging Swisher was a pretext and that its true reason was its belief that Swisher was attempting to "enlist his fellow workers' help in protesting [his] job assignments." We do not agree.

The lawfulness of Swisher's discharge must be viewed, not in the narrow context of the circumstances immediately surrounding his discharge, but rather in the broad context of his numerous periods of employment by Respondent. In this regard the record shows that Swisher has been employed by Respondent on at least four separate occasions, the last beginning in August and ending with his discharge on 27 October. Of his three previous periods of employment, two ended with his discharge for being under the influence of drugs; on the other occasion, Swisher quit rather than perform the job of shoveling the belt line. Swisher was hired in August only after his grandfather interceded on his behalf with Winford Davis, Respondent's president and a personal friend; Swisher's grandfather explained that Swisher needed a job in order to be able to receive probation rather than a jail sentence for a drug-trafficking conviction in Kentucky.

From the time he was hired in August until his discharge on 27 October, Swisher was classified as a general laborer. As a general laborer, Swisher was assigned various jobs, including the job of motorman and the job of shoveling the belt line. Whenever Swisher was assigned the job of shoveling the belt line, however, he would complain to his superiors; indeed, on at least one occasion, Swisher pounded his fist on Don Davis' desk and stated that he was not going to shovel belt lines any more. Thereafter, as the Administrative Law Judge found, Swisher began to feign illness in order to avoid performing this work. In this regard, the record shows that, on his last 2 days of employment, Swisher was assigned the job of shoveling the belt line and, on each day, he left work early feigning illness.

In view of the foregoing, we find that Respondent would have discharged Swisher for his repeat-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] All dates used hereinafter shall refer to the calendar year 1980 unless otherwise specifically indicated.

[3] At the time of his discharge, Swisher was classified as a "general laborer." As a general laborer, Swisher was assigned to various jobs, including the job of "motorman" and the job of "shoveling the belt line." A "motorman" drives the vehicle which transports men and supplies into the mine; "shoveling the belt line" consists of shoveling the coal which has fallen to the mine floor from the conveyor belt which carries the coal out of the mine.

[4] Committeemen were employees designated by their fellows to pursue grievances with management.

ed, insubordinate refusals to perform his assigned work of shoveling the belt line even absent his efforts to "enlist his fellow workers' help in protesting [his] job assignments." Accordingly, we shall dismiss this aspect of the complaint.[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Davis Coal Company, Kermit, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraphs 2(a) and (b):

"(a) Offer Jesse Muncy, Raymond Fillinger, Cecil Marcum, Jackie Spaulding, Charles Fillinger, Kessler Marcum, Bill Muncy, Charley Conley, Roger Lee Williams, Fred Fitchpatrick, Bobby Lee Marcum, Ernest Sturgill, and James F. Mollett immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights previously enjoyed, and make them whole for any loss of earnings they may have suffered because of their discharges, with interest, in the manner set forth in the section of the Administrative Law Judge's Decision entitled 'The Remedy.'

"(b) Expunge from its records and files any references to its unlawful discharges of the above-named employees, and notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel action against them."

2. Substitute the attached notice for that of the Administrative Law Judge.

[5] In view of our finding that Respondent lawfully discharged Swisher, it follows that the strike which began thereafter was, at the outset, economic in nature; however, this strike was converted into an unfair labor practice strike on 4 November, when Respondent began its unlawful campaign of dismissing the striking employees.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT discharge employees because of their union or other protected concerted activities.

WE WILL NOT require that employees promise not to strike, nor will we deduct or withhold from the wages of employees who go on strike any monetary penalty.

WE WILL NOT withhold or deny benefits that employees have earned if they go on strike.

WE WILL NOT make statements that threaten or coerce employees in the exercise of the rights guaranteed them by the Act.

WE WILL NOT display weapons in the presence of employees who are picketing peacefully.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by the Act.

WE WILL offer the following employees reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole, with interest, for any loss of earnings they may have suffered because of their discharges: Jesse Muncy, Raymond Fillinger, Cecil Marcum, Jackie Spaulding, Charles Fillinger, Kessler Marcum, Bill Muncy, Charley Conley, Roger Lee Williams, Fred Fitchpatrick, Bobby Lee Marcum, Ernest Sturgill, and James F. Mollett.

WE WILL expunge from our records and files any references to our unlawful discharges of the above-named employees, and WE WILL notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel action against them.

DAVIS COAL COMPANY

DECISION

BURTON S. KOLKO, Administrative Law Judge: The Davis Coal Company operates a single shaft mine in Kermit, West Virginia.[1] In the fall of 1980 Dennis Swisher was discharged for "walking off the job." Several other miners were arriving as Swisher was being fired, and they immediately went on strike and commenced picketing to support Swisher's efforts to get his job back. After about a week's time some of the picketing employees were fired, and after a month's time the rest were fired.

The General Counsel's complaint in effect seeks reinstatement with backpay for Swisher and the other fired employees, and a cease and desist order against Respondent's threats, statements, and reprisals that accompanied the firings. I grant the relief sought.

I. THE DISCHARGE OF DENNIS SWISHER

On October 27, Respondent discharged employee Dennis Swisher. Swisher had been employed several times by Respondent, the last time for approximately 2 months prior to the date of his discharge. At the time he was discharged Swisher normally performed the job of motorman on the third shift. On the evening of October 26, Swisher arrived approximately an hour late for work[2] and was assigned to perform the work of shoveling the belt line, which brings out coal from inside the mine. Swisher shoveled the belt line until approximately 6:45 a.m. at which time he said he was ill and requested and received permission to leave the mine from Third-Shift Belt Foreman Eugene Hamb. Hamb advised Swisher that he would make a notation on Swisher's timecard that he was sick. Upon leaving the mine, Swisher talked with employees Bobby Marcum and Bill Muncy in the employees' dressing area and advised them that his motorman position had been taken away from him. Swisher then met with Mine Foreman Richard Brown outside the mine office. They then had a discussion about Swisher being removed from the motorman position and being required to shovel the belt line. The conversation terminated with Swisher stating that if he did not get his motorman job back he would ask the employees to strike for that purpose. Brown replied that if he asked the employees to strike he would be fired. Following this conversation, part of which was heard by General Manager Don Davis as he was arriving, Brown proceeded to the mine office where he was later joined by Swisher, Muncy, and Marcum. Brown and General Manager Don Davis were already in the mine office when Swisher and the employees arrived. A brief conversation ensued with Davis telling Swisher that he was "fired for walking off the job." Swisher replied that he would ask the employees to support him in getting his job back. At that point all the employees who were present for work on the day shift went "across the road" and refused to work.

Swisher had made similar complaints concerning job assigments in the past, and on at least two other occasions to Don Davis' knowledge he had attempted to get the employees to go out on strike.

Given this background, the General Counsel argues on brief that Davis fired Swisher "because Davis believed that Swisher would again, as he had in the past, attempt to get employees to strike concerning a complaint he had about his new job assigment."[3]

Respondent argues that Don Davis was not without some reason in being suspicious about Swisher's sudden appearance out of the mine. Swisher had been a troublesome employee in his previous employment episodes with the Company, and had been previously discharged for refusing to do his job and for being under the influence of drugs. Indeed, his reemployment at the mine had occurred only after Swisher's grandfather had interceded with Respondent President Winford Davis, a friend, on Swisher's behalf. In this light I can understand how Don Davis would "see red" when the "ungrateful" Swisher was feared to be instigating still another strike. But such equities aside, I find that Swisher was on a mission to enlist his fellow employees' aid in protecting his job assignment and got fired for that reason.

As the Court of Appeals for the Fourth Circuit, where this arises, has recently stated:

> To establish that a single employee is engaged in protected concerted activity, the evidence must show that he is seeking either to enforce a bargaining agreement, to induce group action, or to act on behalf of other employees. Personal concerns or missions are insufficient to demonstrate concerted action.[4]

There being no collective-bargaining agreement, Swisher cannot be said to be attempting to enforce its provisions. Nor was he acting for other employees. Thus, to take his leaving the mine out of the category of a mere personal mission Swisher must be found to have been seeking to induce group action. From Swisher's previous conduct concerning this job assignment, I draw the inference and find that he was.

Swisher was no stranger to the job of shoveling the belt line.[5] He had been fired once before for not performing that assigned task. On that occasion he had tried to set up a picket line in protest, but failed because by that time the other men were already inside the mine. On another occasion several weeks before, he pounded on Don Davis' desk and complained about having to shovel the belt line. And at another time, Don Davis overheard Swisher complaining to a fellow employee. In these in-

[1] During the 12 months preceding the consolidated complaint Respondent sold and shipped products, goods, and materials valued over $50,000 to other West Virginia nonretail enterprises that annually sold and shipped to points outside West Virginia goods and materials valued over $50,000.

[2] Although Swisher was late for work on the last day of his employment, Respondent does not contend that this had anything to do with his discharge.

[3] G.C. br., p. 12.

[4] *Tyler Business Services v. NLRB*, 680 F.2d 338, 339 (4th Cir. 1982). See also *Blaw-Knox Foundry v. NLRB*, 646 F.2d 113 (4th Cir. 1981); *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304 (4th Cir. 1980); and *Joanna Cotton Mills v. NLRB*, 176 F.2d 749 (4th Cir. 1949).

[5] "Shoveling the belt line" means shoveling the coal that has fallen off the conveyor belt to the mine floor. In Don Davis' words "it is nasty. Very unpopular."

stances Swisher was emphatic that he did not want to do that work. In effect Swisher's attitude crystalized around his perception that he was doing more than his share of that task.[6]

Swisher had, in fact, been assigned to shovel the belt line the day before his discharge, but worked for only 2 hours before punching out sick. Swisher's testimony on that incident was:

> I wasn't sick. I was almost sick. In other words, I was feeling chills . . . I was running a temperature you might say. I am no doctor but I was still ill, and so, I did what I could do; as long as I could do it, and then when I felt I couldn't any more then I came outside.

This tracks Swisher's testimony about his getting sick one-half hour before the shift change on the day he was discharged. This testimony, and my observation of Swisher's demeanor in giving it, convinces me that Swisher's episodes of "sickness" were his way of manifesting what he earlier had told Don Davis; i.e., that he was not going to shovel belt lines any more.[7]

The upshot is that when Swisher clocked out "sick" before the shift changed on the day of his discharge, he had it in mind to enlist his fellow employees' help in securing his other job back—running the transport "motor" into and out of the mine. In his eyes, that was his permanent job. His actions that night and the following day make that conclusion clear:

(1) As soon as he found out after his late arrival for work that he was to shovel the belt, he phoned his committeeman[8] to complain.

(2) After leaving the mine just before the shift change, he went to the dressing room and told the incoming shift "that I had a disagreement that I wanted to straighten out with Richard Brown [and] that it might not be settled, for them to wait and see what the outcome was before they went to work."

(3) He then went outside to complain to Foreman Brown, a conversation that was in part overheard by Don Davis. It was in this conversation that Brown told Swisher that if Swisher pulled the men out on strike he would be fired.

(4) Thereupon Swisher returned to the dressing room to get the committeemen, Bill Muncy and Bob Marcum. They went to the mine office, whereupon Don Davis discharged Swisher.

(5) Swisher, the committeemen, and the rest of the day shift went on strike "across the road," picketing initially for "two or three hours."

(6) Swisher then went home and returned in the afternoon and at night to picket. He did not go to the doctor. The picketing continued until April 1981, when the strike petered out, although Swisher did not picket after the end of December 1980.

In sum, while it is clear that Swisher's annoyance at being directed on occasion to shovel the belt line was a personal grievance, the event causing his discharge—his leaving the mine early—was not a personal mission but a calculated plan to buttonhole the arriving day shift before they were in the mine and take them out on strike to protest his job assignment. And in fact, he succeeded in getting the men to strike with him. As it happened, Respondent's action in firing Swisher changed the purpose of the strike, for they then were striking to protest Swisher's discharge, and turned an inchoate economic strike into an unfair labor practice strike.[9] Swisher's attaining their support on the job assignment question indicated their "common concern" over the issue, and thus its concerted nature. See *Air Surrey Corp.*, 229 NLRB 1064 (1977), and *W. C. Electrical Co.*, 262 NLRB 557 (1982); but see *Comet Fast Freight*, 262 NLRB 430 (1982).

Respondent argues that it was justified in discharging Swisher because "he was a wretched employee." I find that such justification is a pretext and that Respondent discharged Swisher because he was going to try to take the miners out on strike to protest his job assignment.

Don Davis admitted that, as he overheard Swisher and Foreman Brown arguing about shoveling the belt line, "I knew . . . that he was out of the mine for other reasons than being sick or whatever." His suspicions having been aroused about what mischief Swisher might be up to this time, Davis' fears were confirmed when Brown came into the office after threatening Swisher. As Swisher credibly testified, when he entered the mine office after leaving Brown and rounding up the committeemen, Davis and Brown were talking. While Davis denied that he knew what Brown and Swisher had been talking about, it strains credibility that Brown would not have been asked by Davis about that conversation. As Davis admitted, Brown was a new foreman and Davis was curious how he would handle Swisher. Having learned that Swisher was talking about starting another strike, Davis reacted by firing Swisher within moments after Swisher entered the mine office. While Davis' stated reason to Swisher was that Swisher walked off the job and refused an assignment, the real reason was that "troublemaking Swisher" was going to start another strike, and the Company did not want that "trouble" again.[10]

Respondent also argues that Swisher's conduct leading to his discharge was not protected activity. In effect Respondent is noting the Fourth Circuit's "distinction between single refusals to work over working conditions and recurrent refusals to perform a particular job . . . the first being protected activity, the latter not being protected." *Excavation-Construction v. NLRB*, 660 F.2d 1015, 1021 (4th Cir. 1981). Thus, Respondent argues that

[6] Assignments for shoveling the belt line were usually made to the "general" workers, such as Swisher; often the foreman helped shovel.

[7] While Swisher denies that he said that or pounded on Don Davis' desk, he does not deny complaining about what he felt was discriminatory treatment. I credit Don Davis' version of these episodes.

[8] Committeemen were employees designated by their fellows to pursue grievances with management.

[9] "It is well settled that a strike is an unfair labor practice strike 'if an unfair labor practice had anything to do with causing the strike.' *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir. 1972), cert. denied 409 U.S. 850." *Tarlas Meat Co.*, 239 NLRB 1400, 1401, fn. 6 (1979).

[10] It is just as well that Respondent does not argue that Davis entertained a good-faith belief that Swisher was guilty of misconduct by being out of the mine, since the General Counsel has established that Swisher had his foreman's permission. See *Co-Con, Inc.*, 238 NLRB 283, 288 (1978).

Swisher was fired by Don Davis not because Swisher had left his job without permission, but for Swisher's repeated refusal to do assigned work, i.e., shovel the belt line. But Respondent admits that "[i]mmediately upon entering the office, Swisher was discharged by Davis for leaving his job before the end of the scheduled shift time and refusing to do assigned work." Brief at p. 8. As I have found, the "reason" was pretextual. Swisher's mission being to enlist his fellow workers' help in protesting job assignments, it follows that he was engaging in protected activity. *Circle Import Export*, 244 NLRB 255, 258–259 (1979).

II. RESPONDENT'S DISCHARGE OF THE PICKETERS

For several months after October 27 various employees of Respondent picketed outside the mine site. Some employees were more active in the strike than others. According to Winford Davis, there were 8 to 10 employees who were present at the picket line most often. Davis testified that Bill and Jesse Muncy, Raymond and Charles Fillinger, Kessler and Cecil Marcum, Charley Conley, and Jackie Spaulding were on the picket line several times during the first few days of the strike. Davis was also aware that other employees were at the picket line on various occasions, including Roger Williams, Ernest Sturgill, James Mollett, and Bobby Marcum. Fred Fitchpatrick also was in the vicinity of the picket line with the pickets on a few occasions. In any event, none of these individuals crossed the picket line to return to work during the strike.

On November 4, Winford Davis called a meeting of employees who were not picketing but had not returned to work. This was held at the mine office, at which time Davis informed the employees that anyone who wanted to return would be put on salary and the others would be laid off. He admitted instituting the salary pay plan to enable the employees to feel better about returning to work during the strike.[11]

Conley was apparently supposed to attend this meeting but arrived too late to do so. However, he did have a conversation with Don Davis on this date at the mine. Davis told him that Respondent was "bringing everybody back that would sign a paper, to go on salary." Davis further stated that the meeting did not concern Conley as he was one of the eight who had been fired. Nevertheless, Davis told Conley he could return to work that night. Conley returned to the mine that night but refused to cross the picket line.

On November 4, Davis met with the Muncys and the Fillingers in the mine office several times. They asked Davis for the paychecks and bonus and vacation checks owed to them for the period they had worked prior to the strike. His reply was that the only way they would get their paychecks was if they signed quit slips. However, after discussing the matter they again talked with Davis and informed him that if they were paid in full that they would go home and give him no problems.[12] However, Davis refused to pay the employees in full, giving them only one paycheck and one coal bonus check. He refused to give them their Christmas bonus, vacation pay, and their last coal bonus check. The employees refused to accept Davis' offer and refused to quit their employment. At one point during these various meeting with the Muncys and Fillingers, Davis told them that he knew where everyone lived, that it was a long, dark road from the mine to Logan, West Virginia, and that they had better watch over their shoulders. Raymond Fillinger responded that he felt that was a threat and Davis replied that it was. These employees did not sign quit slips and continued to picket at the mine site.

On November 4, Winford Davis also had a conversation with employee Cecil Marcum in the vicinity of the picket line.[13] Marcum inquired about obtaining his paycheck. He also asked Davis if, as he had heard, he had been fired due to the picket line. Davis replied that Marcum had in fact been fired over the picket line. Davis told Marcum to come to the office and he would be given his paycheck but that he could not get his coal bonus check as Davis was holding it for a strike fund. Later that day, Marcum went to see Davis to get his paycheck. His brother, Kessler Marcum, was also present. Cecil Marcum asked about his paycheck and Davis replied that he had to sign a quit slip before he could get his paycheck. Cecil Marcum also asked if Davis would write out a reason as to why he was discharged, to which Davis replied that he could not do that but that Marcum was "fired over the picket line."

On the morning of November 5, Winford Davis had a conversation with certain of the employees who were picketing outside the mine office. Swisher and the Fillingers were present. Swisher approached Davis and asked him if he knew that his daughter had been shooting at the picketers that night. Davis replied that he was aware of the shooting and stated that, if it had been him, he would have "blown [Swisher's] f— brains out."

Sometime around the middle of November, several of the employees went to the mine office to talk with Winford Davis. The Fillingers, the Muncys, the Marcums, and Conley were present during the conversation. They asked Davis whether they were going to get the money they felt they were owed. David replied that he could not pay them in full and that he would not pay them any more than the amounts paid during their prior meeting on November 4. Davis suggested that he give some of them a Christmas loan. During the conversation, Davis was asked by Jesse Muncy why they had been fired. His reply was that they were all fired because they had set up a permanent picket line or been on the picket line.

Additionally, Respondent attempted to get an injunction against those employees who were picketing at the mine. A hearing was conducted in the state court on No-

[11] Of the witnesses who testified about this meeting, including Winford Davis, only Don Davis recalled it as being in late rather than early November. I credit the preponderate testimony, although the date itself is irrelevant since it is certain that the meeting was held in the critical October 27-December 1 period.

[12] Davis had told Jesse Muncy that the employees were causing him problems just by being on the picket line.

[13] Marcum testified that the conversation occurred on or about October 5. However, it is clear from his testimony that this conversation took place after the beginning of the strike and, from the record as a whole, that the conversation took place on or about November 4.

vember 18. At the injunction hearing, Winford Davis stated that the employees who were picketing were all fired and would not work for Respondent again.

On November 25, Winford Davis sent letters to 13 employees who were engaged in the strike (G.C. Exh. 5). These letters were sent to employees Fitchpatrick, Sturgill, Mollett, Bobby Marcum, Williams, and others. The letters advised the employees that Respondent was open for production and that, if they did not return to work on December 1, they would be terminated. None of the above-named employees returned to work on that date as the strike was still in progress at the time. When they failed to return to work on December 1, they were terminated by Respondent.

As the General Counsel argues on brief, several violations flow from this sequence of events. The most egregious is Respondent's discharge of those who picketed or refused to cross the picket line at the mine to work.

There is no question that the strike and picketing were protected concerted activities.

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping, and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.[14]

Of course, after these employees were fired they had an "immediate stake in the outcome" of their subsequent picketing. But their firings came because of their picketing on behalf of Dennis Swisher's unlawful discharge, and in this Respondent clearly erred.[15]

The Muncys, Fillingers, and Marcums were terminated on Respondent's records on November 6, 1980, allegedly for "interfering with company management." Respondent relies on Winford Davis' conversation with the Muncys and Fillingers on November 4, where they told Davis that if they were paid in full they would go home and give him no problems, as proving that these men quit. But, as earlier found, they were not paid in full, did not sign quit slips, and did not go home. They continued to picket. The Marcums were told when they came for their checks that they would not be paid in full; they were told by Winford Davis that they were being fired because of the picket line. And all these men plus Conley were told within a couple of weeks thereafter that they had all been discharged for establishing a picket line at the mine.[16] Respondent's own actions belie any notion that these employees quit.

As for the remaining men[17] as well as the seven just discussed) Respondent's letter of November 25[18] made it clear that if they did not return to work on December 1 they would be terminated. They did not return, and were terminated. They were still on strike. In Respondent's view, it was within its rights, it being "clear from the case law that the tactical discharge of employees made during an attempt to obtain a return to work of striking employees does not constitute an unfair labor practice." Alas, the cases comprising this phantom case law are not mentioned by Respondent—indeed no case is cited on brief—and in fact the case law as it applies here is the opposite. It is an unfair labor practice to discharge a striking employee. *Vulcan-Hart Corp.*, 262 NLRB 167 (1982); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). Thus, it is 13 unfair labor practices to discharge the men just mentioned who were the subject of Respondent's November 25 letter.

III. RESPONDENT'S COERCIVE STATEMENTS

Respondent also violated the Act when the following threatening statements were made, in all cases but one by Winford Davis, to the strikers: (1) that their coal bonus payments and Christmas bonuses would be withheld; (2) that they were discharged because of their picketing activities; (3) that it was a long dark road to Logan and everyone knew where they lived; (4) that had it been he rather than his daughter who had fired shots earlier he "would have blown [Swisher's] f— brains out" (this made with his gun visible to the picketers, itself an unfair labor practice;[19] (5) that employees not crossing the picket line to report for work would be laid off (this in conjunction with the decision to put the picket-line-crossing employees on salary); and (6) Brown's statement to Swisher that he would be discharged if he took the men out on strike. Respondnt's only defense to these is that the testifying employees are not to be believed. But I find their testimony entirely credible concerning these events.

The complaint also alleges that in mid-October, prior to the Swisher episode that started the strike, Winford Davis and Don Davis made statements that violate Section 8(a)(1). At the time, some employees were striking concerning the discharge, later rescinded, of Jackie Spaulding. Winford Davis allegedly told employees, in response to a statement about the employees attempting to get the United Mine Workers to organize, that before he would have a union he would take a bulldozer and cover up the mouth of the mine. At the same time Don Davis allegedly told the employees that by striking they would adversely affect their vacation pay and Christmas bonus.

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[14] *NLRB v. J. Weingarten*, 420 U.S. 251, 261 (1974), as held in *NLRB v. Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-506 (2d Cir. 1942), cited in *Houston Contractors Assn. v. NLRB*, 386 U.S. 664, 668-669 (1967); *Materials Research Corp.*, 262 NLRB 1010 (1982).

[15] *Laidlaw Corp.*, 171 NLRB 1366 (1968).

[16] Davis' denial of the discharge comments is not credited, whereas the testimony of Jesse Muncy and the Fillingers about their statements is credited.

[17] Jackie Spaulding, Roger Lee Williams, Fred Fitchpatrick, Bobby Lee Marcum, Ernest Sturgill, and James F. Mollett.

[18] G.C. Exh. 5.

[19] *Highland Plastics*, 256 NLRB 146, 160 (1981).

Winford Davis' statement was testified to by Kessler Marcum and Charles Conley. Conley had to be led to recall it, although Marcum remembered it directly, as well as Don Davis' statement that a strike would hurt them on the bonus and vacation pay. Winford Davis denied making the statment, observing without contradiction that he no longer thought about the Union after it dropped bargaining with him after winning an election in 1978. In the circumstances I credit Winford Davis. But while Don Davis generally denied threatening employees during the Spaulding incident, Marcum's testimony stands uncontradicted that Don Davis did tell the employees that by striking their vacation pay and Christmas bonus accruals would be jeopardized. In effect this was a threat and, therefore, a violation of Section 8(a)(1).

IV. THE WITHHOLDING OF BENEFITS

Respondent had a practice of encouraging production through the payment of coal bonuses, made monthly to employees qualifying for them in the previous month. The total bonus for a month was one dollar for each of the tons of coal mined, divided among the employees on the basis of the ratio of the employee's monthly hours to the total monthly hours.[20] To qualify, the employee must have worked all of the month and all of the succeeding month up to the date of the bonus payment (which was toward the end of the succeeding month). An employee who quit or was fired during this time received no bonus payment. As applied to the striking employees who were discharged by Respondent, they received no bonus for September or October 1980, notwithstanding that they had worked then.[21]

Similarly, Respondent paid Christmas bonuses to those employees who were on the payroll when the bonus was paid in December. The amount of the bonus, $75 per month, was paid according to the number of months each employee had worked since the previous Christmas.[22] An employee on strike during any month lost his eligibility for the bonus for that month. The following, having been discharged for striking, received no 1980 Christmas bonus: Jesse Muncy, Raymond Fillinger, Cecil Marcum, Jackie Spaulding, Charles Fillinger, Kessler Marcum, Bill Muncy, Charlie Conley, Roger Williams, Fred Fitchpatrick, Bobby Lee Marcum, Ernest Sturgill, and James Mollett. Bill Hall received just $450. And, of course, Dennis Swisher received no bonus payments.

Winford Davis testified that an employee had to be at work at the time the bonus was paid in December in order to receive it. "Since the individuals described in the complaint were not working at the time the Christman bonus in 1980 was payable they simply were not entitled to it." (Resp. br. at p. 19.) The same was true for vacation pay, which accrued monthly, and was paid in June only to those who were working then.

The Board and the courts have held that the withholding of benefits to striking employees, "who are distinguishable only by participation in protected concerted activity," is destructive of employee rights under Section 7 of the Act, and, thus, a violation of Section 8(a)(1).[23] But for the unlawful discharge of the employees who were on strike in protest of the firing of Dennis Swisher, those employees would have received coal bonus payments and the Christmas bonus. Cf. *Swift Cleaning & Laundry*, 169 NLRB 359 (1968). Respondent's withholding of those payments evinced an intent to discourage employees from exercising their Section 7 rights by coercing them to abandon the strike. *Indiana & Michigan Electric Co.*, 236 NLRB 986 (1978), enfd. mem. 610 F.2d 812 (4th Cir. 1979). Accordingly, Respondent's withholding of these bonuses is a violation of Section 8(a)(1). Cf. *W. C. Nabors Co. v. NLRB*, 323 F.2d 686, 689-690 (5th Cir. 1963); cf. *Wiegand, supra.*

The vacation pay is another matter. It was not due to be paid until June, well after the strike was abandoned. No employee received it who was not then working, as exemplified by Juanita Ferguson, the company's former bookkeeper, who herself had not received vacation pay, having quit just a few weeks before it was paid. While alleged in the complaint, General Counsel does not press the matter on brief, and I shall dismiss it.[24]

V. THE WITHHOLDING OF WAGES

Since October 1979, Respondent has required its employees to sign individual contracts of employment.[25]

The General Counsel's complaint alleges that the following contract language violates the Act:

> Employee agrees not to cause or participate in any unauthorized strikes. If he does so, he will agree to pay the company twenty dollars ($20.00) for each day and every day this company loses work due to such work stoppage. Employee authorizes company to withhold from his pay that which is due or becomes due.

All employees were required to sign these contracts to be able to work at Respondent, and the contracts were in effect during the 1980 time period that occupies this Decision. Indeed, the contract provision was applied to employees who participated in the Dennis Swisher strike. The General Counsel alleges that "[p]ay was withheld at the rate of $20 per day from the checks of Bill Hall and other employees who returned to work after a period when they had honored the picket line." (Br. at p. 15.)

[20] The individual employee contracts that contain the coal bonus reference (called "coal royalty payment" in the complaint) are found as G.C. Exhs. 6(a)-(n).

[21] Both Muncys and both Fillingers did receive September bonuses, but none for October. The following received no September or October bonus: Cecil Marcum, Jackie Spaulding, Kessler Marcum, Charles Conley, Roger Williams, Fred Fitchpatrick, Bobby Marcum, Ernest Sturgill, and James Mollett.

[22] See G.C. Exhs. (d), (f), and (g).

[23] *Duncan Foundry & Machine Works*, 176 NLRB 263, 264 (1969); *NLRB v. Great Dane Trailers*, 388 U.S. 26, 32 (1967); *E. L. Wiegand Div. v. NLRB*, 650 F.2d 463 (3d Cir. 1981).

[24] As pointed out in *Wiegand, supra*, "The test in deciding if benefits have accrued is whether they are due and payable on the date on which the employer denied them." 650 F.2d at 469. Here the coal bonuses payable in November and December for the previous months had accrued to the striking workers, who had worked in those prior months. And, too, the Christmas bonus had accrued for all of the months beginning the previous December. But not so the vacation bonus, no portion of which was "due and payable" while the workers were on strike.

[25] G.C. Exhs. 6(a)-(n).

Respondent denies neither the existence of the contracts nor the withholding of $20 a day from Bill Hall and others. It does deny that employees were forced to sign them and that the contracts were illegal.

As for the "forced to sign" issue, either the employees signed the contracts or they did not work. so that is really a false issue. What is more germane is Respondent's argument that "[t]he mere fact that this particular provision was contained in a contract between an employee and employer [instead of one between a labor organization and an employer where it would be valid] should certainly yield the same result, that is, that this provision is permissible and does not constitute an unfair labor practice." (Br. at p. 16.)

While Respondent's brief cites no cases to support its contention that if a labor organization can waive the right to strike so can individual employees, the General Counsel correctly argues that since the Board's earliest days such a limitation on individuals' right to strike was, in the later words of the Supreme Court,[26] "inherently destructive of employee interests" by eliminating one of their most effective means for achieving the goals sought by their organizing. *Arcade-Sunshine Co.*, 12 NLRB 259 (1939); *Douglas Aircraft Co.*, 18 NLRB 43 (1939); *Great Western Mushroom Co.*, 27 NLRB 352 (1940). Thus, it is a lame excuse to say, as Respondent does, that such contracts were necessary to prevent employee work stoppages, since the very strike activity aimed at is a basic employee right under Section 7.[27] And it is disingenuous of Respondent to argue that, if a labor organization can waive the right to strike, so can individual employees, when by its actions it is attempting to prevent the employees from acting in concert to achieve the bargaining strength that a labor organization possesses. *Great Western Mushroom, supra.*

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2 (2), (6), and (7) of the Act.

2. Respondent has violated Section 8(a)(1) of the Act by the following actions:

(a) Discharging Dennis Swisher for threatening to go on strike.

(b) Discharging Jesse Muncy, Raymond Fillinger, Cecil Marcum, Jackie Spaulding, Charles Fillinger, Kessler Marcum, Bill Muncy, Charlie Conley, Roger Lee Williams, Fred Fitchpatrick, Bobby Lee Marcum, Ernest Sturgill, and James F. Mollett for striking.

(c) Withholding coal royalty and Christmas bonus payments from the above-named employees.

(d) Making statements that were threatening and coercing to the striking employees.

(e) Displaying firearms to employees peacefully picketing.

(f) Requiring employees to forgo their right to strike in order to work.

(g) Deducting monetary penalties from striking employees' wages.

REMEDY

Having concluded that the strike that began on October 27, 1980, was an unfair labor practice from its inception, I find that it will effectuate the purposes of the Act to order Respondent, in addition to taking the action recommended in the attached order[28] designed to remedy the unfair labor practices found herein, (1) to offer to all strikers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, dismissing, if necessary, any person hired on or after December 1, 1980, and (2) to make them whole for any loss of earnings they may suffer as a result of Respondent's refusal, if any, to reinstate them in a timely fashion, by payment to each of them a sum of money equal to that which each would have earned as wages during the period commencing with their discharge and ending with Respondent's unconditional offer (see *Abilities & Goodwill*, 241 NLRB 27 (1979)), net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[29]

Any dispute about who is to be offered reinstatement and what backpay, if any, is due shall, if necessary, be determined at the compliance stage of this proceeding.

Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I make this recommended:

ORDER[30]

The Respondent, Davis Coal Company, Kermit, West Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because they strike or engage in other concerted protected activities.

(b) Requiring as a condition of employment that employees promise not to strike.

(c) Withholding from employees' pay or deducting amounts therefrom a monetary penalty for striking.

(d) Withholding or denying previously accrued benefits because employees strike.

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[26] *NLRB v. Great Dane Trailers, supra; NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

[27] "While the strike undoubtedly brought inconvenience and economic loss to the Company . . . such a result is obviously the very object of any concerted employee action protected by the Act." *NLRB v. Lasaponara & Sons, Inc.*, 541 F.2d 992, 998 (2d Cir. 1976).

[28] A broad form cease-and-desist order is employed because Respondent has been "shown to have a proclivity to violate the act [and] has engaged in such egregious . . . misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357 (1979); *NLRB v. Blake Construction Co.*, 663 F.2d 272 (D.C. Cir. 1981).

[29] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[30] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(e) Making statements that threaten or coerce employees who are engaging in activities that are protected by Section 7.

(f) Displaying weapons in front of peacefully picketing employees.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Dennis Swisher and the other discharged employees named *supra* immediate and full reinstatement to the former job of each, or if that job no longer exists to a substantially equivalent job, without prejudice to each one's seniority or other rights and privileges, dismissing, if necessary, anyone hired by Respondent on or after December 1, 1980, and make each whole for any loss of earnings in conformity with the above-described "Remedy."

(b) Expunge from its files any reference to the discharge of Dennis Swisher that is the subject of this Decision, and the discharges of the employees listed *supra*, and notify each in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Post at its facility in Kermit, West Virginia, copies of the attached notice marked "Appendix"[31] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

To the extent not found herein, the allegations in the complaint are dismissed.

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[31] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."